

**United States Department of Labor  
Board of Alien Labor Certification Appeals  
Washington, D.C. 20001**

Date: September 30, 1997

Case No. 95 INA 548

In the Matter of:

**TENNECO GAS,**  
Employer

on behalf of

**SHANKAR S. JAGADEESAIYER,**  
Alien

Appearance: C. K. Jen, Esq., Houston, Texas.

Before: Holmes, Neusner and Vittone  
Administrative Law Judges

FREDERICK D. NEUSNER  
Administrative Law Judge

**DECISION AND ORDER**

This case arose from a labor certification application that was filed on behalf of Shankar S. Jagadeesaiyer (Alien) by Tenneco Gas (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Employer and the Alien requested review pursuant to 20 CFR § 656.26.<sup>1</sup>

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there

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<sup>1</sup>This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF") and written arguments. 20 CFR § 656.27 (c).

are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed at that time and place.<sup>2</sup>

### **STATEMENT OF THE CASE**

On August 15, 1994, the Employer applied for Alien Labor Certification to permit it to employ the Alien as a System Analyst, a position in which he will perform the following duties:

Design, develop, implement and maintain data communications software for nominating and scheduling natural gas on pipelines and synchronizing customers' XDB databases with centralized SYBASE database. Integrate several software packages, languages and communication interfaces.

The Employer stated that its minimum education, training, and experience requirements for the job were a Bachelor of Science degree with a major in Computer Science, Electrical Engineering or equivalent; three years experience in the job offered or three years experience as a Computer Analyst or Software Engineer; three advanced level semester credits each in automated systems, system simulation & optimization theory; and one year experience with specified computer systems, programs and languages.<sup>3</sup> The rate of pay being offered for the position by the Employer is \$4,420.00 per month. The position was classified by the Texas Employment Commission (TEC) as a Software Engineer, under Dictionary of Occupational Titles (DOT) Code No. 030.062-010.

On September 12, 1994, TEC informed the Employer that it must submit additional documentation to justify advanced level semester credits since a baccalaureate degree is required for the job opening. The Employer then amended the ETA 750A on September 16, 1994 by deleting the term "advanced" and inserting the term "senior," thereby changing its job requirements to three senior level courses in automated systems, system simulation & optimization theory.

**Notice of Findings.** On May 26, 1995, the CO issued a Notice

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<sup>2</sup>Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

<sup>3</sup>The application documentation supports the finding that the Alien holds a Bachelor degree in Electrical Engineering; that he has three plus years of experience in the Job Offered or equivalent; and that he has taken three credit courses in automated systems, system simulation and optimization theory while pursuing a graduate degree at the University of Arkansas.

of Findings (NOF) in advising that certification would be denied on the grounds that the job opportunity description included unduly restrictive requirements in violation of 20 CFR § 656.21 (b)(2), explaining,

The employer has not presented business necessity documentation to substantiate the requirement of the [three senior level semester credits in automated systems, system simulation, & optimization theory]. It appears that the "senior" level courses are actually graduate level courses. Normally, jobs in the United States involving graduate level academic qualifications do not have graduate level courses as minimum requirements. In the typical course of study, a student working toward a Bachelor's degree would not pursue graduate level work. Consequently, the requirement for the graduate level course work is considered unduly restrictive.

The above stated requirement may not be based on employer and/or customer preference or convenience. It must be a requirement actually arising from business necessity. While completion of the graduate level course may prove advantageous, the absence of such would not preclude one from performing the basic job duties. It appears that the requirement is a preference, not a business necessity and as such is restrictive and precludes referral of otherwise qualified U. S. workers. All restrictive requirements must be justified or in the absence of justification, deleted from the job order.

This section of the federal regulations requires that the job opportunity's requirements, unless arising from business necessity, shall be those normally required for the job in the United States. The requirement for graduate level course work has been determined not to be normally required for jobs in the United States and as such is unduly restrictive.

The Employer was informed that the only way in which it could rebut the NOF was by showing that the requirement for the courses arises from business necessity. The only alternative offered was for the requirement to be deleted and the position readvertised.

**Rebuttal.** In its June 6, 1995, rebuttal to the NOF the Employer furnished details of what was involved in the nomination and scheduling of natural gas and argued that competence in automation, simulation and optimization bore a reasonable relationship to its business as one of the Nation's largest natural gas transmission companies, contending that this background was essential to performance of the stated job duties. The Employer added,

Our job requirements are also in accordance with the

Specific Vocational Preparation (SVP) standard of the U.S. Department of Labor for the occupation of software engineer with Specific Vocational Preparation level as 8, reasoning development, mathematical and language development levels as 5. (Dictionary of Occupational Titles Revised 4<sup>th</sup> Edition 199, pp.43-44, 1009, 1010, 1011, U.S. Department of Labor). The level 8 of Specific Vocational Preparation requires 4-10 years of vocational preparation time in vocational education, training and essential experience for the occupation. Our minimum requirements of B.S. degree in Computer Science or Electrical Engineering, 3 years experience in the job offered or as a computer analyst or software engineer and 3 senior level semester credits each in automated systems, system simulation, and optimization theory are equivalent to about 5-6 years of SVP. Our rate of compensation at U. S. \$53,040.00 annually for this position also justifies the job requirements we have set forth.

Copies of the DOT entry for a "Software Engineer" and Appendix C to the DOT containing an explanation of the SVP codes were attached to the rebuttal.

**Final Determination.** On June 30, 1995, the CO's Final Determination denied Employer's application because:

The employer has failed to provide sufficient justification to establish that the requirement of graduate level courses is normal to the occupation in the United States, when the employer's minimum educational requirement is at the baccalaureate level. This requirement is considered unduly restrictive. The application is consequently denied.

**Motion to Reconsider and Appeal.** In response to the Employer's July 20, 1995, Motion to Reconsider the CO said,

Please be advised that once a labor certification has been denied, the only recourse is to file an appeal with the Administrative Law Judge, 20 CFR 656.26. The regulations do not provide for the reconsideration of a denial of a labor certification at the Regional Office.

We are, therefore, preparing your case for transmittal to the Administrative Law Judge.

In response to the Employer's request for a review of the denial, the CO referred the Appellate File (AF) to the Board.

## DISCUSSION

The Board has long held that the CO has the authority to

reconsider the Final Determinations if the request is timely filed within thirty-five days of its issuance. **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988) (en banc). The Board has held further that, in responding to a timely motion for reconsideration the CO must decide whether that motion will be granted or denied. The failure of the CO to rule on such motion requires that the case be remanded for such action. **Harry Tancredi**, supra. On the other hand, this precedent does not compel BALCA to remand and, in this case, the CO's finding of fact is clear, the motion to reconsider simply asks that finding be reversed. Consequently, we will address the central issue without remanding this application to the CO to reconsider the Final Determination.

As the CO explained, 20 CFR § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. This subsection requires the Employer to establish the business necessity for that job requirement where it cannot demonstrate that the requirement is normal for the occupation or that it is encompassed by the job description in the DOT. After examining the application, the Employer's description of the work to be performed in this position was compared with the DOT job description of the work of a software engineer, the classification designated by the state employment service and the CO. The DOT description of this position is as follows:

030.062-010 SOFTWARE ENGINEER(profess. & kin.) Researches, designs, and develops computer software systems, in conjunction with hardware product development, for medical, industrial, military, communications, aerospace, and scientific applications, applying principles and techniques of computer science, engineering, and mathematical analysis: Analyzes software requirements to determine feasibility of design within time and cost constraints. Consults with hardware engineers and other engineering staff to evaluate interface between hardware and software, and operational and performance requirements of overall system. Formulates and designs software system, using scientific analysis and mathematical models to predict and measure outcome and consequences of design. Develops and directs software system testing procedures, programming, and documentation. Consults with customer concerning maintenance of software system. May coordinate installation of software system.  
... SVP:8... .

This entry clearly indicates the SVP of 8 encompasses the Employer's special requirements of senior level semester credits designated by the DOT for this position. Moreover, it also demonstrates that the job is highly technical in nature, and its breadth suggests that the work is well within the language of the DOT. As a consequence, we conclude that the Employer's educational requirement did not exceed that permitted by the DOT

and that this application should be remanded to the Certifying Officer with instructions to grant the alien labor certification for which the Employer has applied, as the Appellate File further indicates that the Employer has sustained its burden of proving that there are not sufficient workers in the United States who are able, willing, qualified, and available to perform the duties of this position. As the CO has not questioned the Employer's capacity to demonstrate that the employment of this Alien will not adversely affect the wages and working conditions of United States workers similarly employed, there is no reason for further proceedings in this matter and the following order will enter.

### **ORDER**

This application is hereby remanded to the Certifying Officer for with directions to grant the alien labor certification for which this Employer has applied in behalf of this Alien.

For the panel:

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FREDERICK D. NEUSNER  
Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.





## BALCA VOTE SHEET

CASE NO. 95-INA-548

TENNECO GAS,     Employer  
SHANKAR S. JAGADEESAIYER, Alien

Panel: This is a redraft of the original version. It conforms to the dissent and may be reexamined and reconsidered. FDN

PLEASE INITIAL THE APPROPRIATE BOX.

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	:	CONCUR	:	DISSENT
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Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

August 26, 1997